TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 493.

THE UNITED STATES, APPELLANT,

vs.

ERIE RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MAY 22, 1914.

(24231)

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1 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, petitioner, *vs.* ERIE RAILROAD COMPANY. } In Equity Action No. 1. E. 11–65.

Hon. ALEXANDER GILCHRIST, Jr.,
Clerk United States District Court,
Southern District of New York:

You will please take notice that the portions of the record to be incorporated into the transcript on the appeal of the petitioner herein, represented by the undersigned solicitor, are as follows:

A. Subpœna.
1. Petition of the United States.
2. Answer of the respondent.
3. Petitioner's notice of motion for judgment and the relief prayed for in the petitioner's bill upon the bill and answer filed herein.
4. Stipulation as to the facts set forth in the petition and answer and made upon the record of the court at the trial of the above-mentioned cause.
5. Opinion and decision of the District Court written by Hough, D. J.
6. The decree.
7. Petition for allowance of appeal.
8. Assignments of error.
2 9. Allowance of appeal.
10. Citation on appeal.

NEW YORK, *April 29, 1914.*

H. SNOWDEN MARSHALL,
Solicitor for the Petitioner, United States Attorney for the Southern District of New York.

(Office and post-office address: Room 50, United States Court and Post-Office Building, borough of Manhattan, city of New York.)

It is hereby stipulated that the foregoing papers shall constitute the record on appeal herein.

H. SNOWDEN MARSHALL,
U. S. Attorney, Solicitor for Petitioner.
GEO. F. BROWNELL,
M. B. PIERCE,
Solicitor for Respondent.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed May 1, 1914.

3 *The President of the United States of America, to Erie Railroad Company, Greeting:*

You are hereby commanded to appear before the judges of the District Court of the United States of America for the Southern

District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said court in a suit in equity, by United States of America, Action No. 1, and to further do and receive what the said court shall have considered in this behalf; and this you are not to omit under the penalty on you of two hundred and fifty dollars ($250).

Witness, Honorable Charles M. Hough, judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 23rd day of January, in the year one thousand nine hundred and fourteen and of the Independence of the United States of America the one hundred and thirty-eighth.

ALEX. GILCHRIST, Jr., *Clerk.*

H. SNOWDEN MARSHALL,
United States Attorney, Sol'r. for Petitioner.

The defendant is required to file its answer or other defense in the above cause in the clerk's office of this court, on or before the twentieth day after service hereof, excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

ALEX. GILCHRIST, Jr., *Clerk.*

4 (Endorsed): I hereby certify, that on the 23rd day of January, 1914, at the city of New York, in my district, I served the within subpœna in equity upon the within-named defendant, Erie Railroad Company, by exhibiting to Geo. F. Brownell, vice pres. and general solicitor of said Co., at 50 Church St., N. Y. City, as per admission endorsed on the within original, and at the same time leaving with him a copy thereof, and at the same time and place left with him a copy of bill in equity in this suit.

WILLIAM HENKEL,
United States Marshal, Southern District of New York.

Dated January 24, 1914.

Service accepted Jan. 23, 1914, of the within subpœna and petition.

GEO. F. BROWNELL,
Vice Prest. and General Solicitor, Erie Railroad Co.

U. S. District Court, S. D. of N. Y., Filed Jan. 26, 1914.

5 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER, *vs.* ERIE RAILROAD COMPANY, RESPONDENT.	In Equity. No. 1.

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

H. Snowden Marshall, United States Attorney for the Southern District of New York, who petitions herein on behalf of the United States of America, doth, upon information and belief, complain and say:

First. That this proceeding is in pursuance of section 3 of the act entitled "An act to further regulate commerce with foreign nations and among the States," approved February 19, 1903, and is instituted by the said United States Attorney for the Southern District of New York, on behalf of the United States of America, at the direction of the Attorney General of the United States.

Second. That said Erie Railroad Company is a corporation organized and existing under the laws of the State of New York; and that upon January 1, 1912, it was and ever since has been, and now is, a common carrier engaged in the transportation of passengers
6 and property for hire, wholly by railroad, from one State of the United States to other States of the United States, operating lines of railroad extending from the city of New York, in the State of New York, to Jersey City, in the State of New Jersey; from Jersey City aforesaid to Suffern, in the State of New York, and from Suffern to Salamanca, in the said State of New York, and from Salamanca aforesaid to Marion, in the State of Ohio, and elsewhere; passing through the States of New York, New Jersey, Pennsylvania, and Ohio.

Third. Your petitioner charges that within and during the time aforesaid, said Erie Railroad Company, well knowing all the facts in this petition set forth, at and within the Southern District of New York, has repeatedly, in violation of the provisions of the first section of the act to regulate commerce, approved February 4, 1887, as amended, unlawfully issued and given to agents of various trans-Atlantic steamship lines not subject to the act to regulate commerce, free interstate passes over and upon the interstate lines and routes of transportation of said Erie Railroad Company; and that none of the said agents of the said various trans-Atlantic steamship lines, and to whom such passes were issued and given, was at the time aforesaid, nor at any other time, an employee or member of the family of an employee, or an officer, agent, surgeon, physician, or an attorney at law of said Erie Railroad Company, nor at any time has any of the said agents of said various trans-Atlantic steamship lines been in any other manner within one of the excepted classes, to members of which, under the provisions of the said act to regulate commerce, free interstate passes might lawfully be issued by the said Erie Railroad Company. That said free interstate passes were issued as aforesaid at the request of the said various trans-Atlantic steamship companies which employed the said agents as aforesaid, and in pursuance of a practice of interchanging
7 free passes between said trans-Atlantic steamship lines and the said Erie Railroad Company.

Fourth. That the said trans-Atlantic steamship lines, to the agents of which free interstate passes were issued as aforesaid, conduct their entire business upon the high seas, and are common carriers of freight and passengers between ports of the United States and ports in certain European countries and elsewhere. None of said trans-Atlantic steamship lines, as aforesaid, receive freight on through bills

of lading from American railroads which are subject to the act to regulate commerce; nor are said trans-Atlantic steamship lines otherwise associated with any American railroad subject to the act to regulate commerce in such manner that both are under a common control, management, or arrangement for the continuous carriage and shipment of passengers or property in interstate commerce; nor are any of said trans-Atlantic steamship lines within the terms or meaning of the proviso in the first section of the act to regulate commerce, whereby common carriers subject to said act to regulate commerce may lawfully issue and interchange free passes and transportation for their respective officers, agents, and employees and their families.

Fifth. That at divers times since passes were issued by the said Erie Railroad Company to said agents of trans-Atlantic steamship lines as aforesaid, said agents or some of them, have obtained free transportation thereon, and by means thereof, over and upon the interstate lines and routes of the said Erie Railroad Company, in violation of the provisions of section 1 of the said act to regulate commerce, and in further violation of section 6 of said act, whereby a carrier is forbidden to charge a less or different compensation for the transportation of passengers than the fares and rates specified
8 and filed with the Interstate Commerce Commission of the United States, pursuant to the provisions of the said act to regulate commerce, and which fares and rates were in effect at the times such transportation took place.

Sixth. That while and during the time said Erie Railroad Company was furnishing free interstate transportation over its railway lines and routes to the said agents of the said trans-Atlantic steamship lines, or some of them, as aforesaid, the said Erie Railroad Company contemporaneously transported other persons over and upon its said interstate lines and routes between the same points from and to which the said agents of the various trans-Atlantic steamship lines, or some of them, were transported as aforesaid; and the said Erie Railroad Company did exact and receive in money from such other persons for the transportation so furnished to them, the full amount of the rates named in its schedules of rates, fares, and charges, duly filed with the Interstate Commerce Commission, and which were in force at the time such transportation was furnished, and that in each instance the circumstances and conditions pertaining to the transportation furnished to, and the transportation services performed for, said agents of the various trans-Atlantic steamship lines, or some of them, were substantially similar to the circumstances and conditions furnished to, and the transportation services performed for, such other persons as aforesaid, all of which was in violation of the provisions contained in the second section of the said act to regulate commerce.

Seventh. That while and during the time that the said Erie Railroad Company furnished to the said agents of the various trans-Atlantic steamship lines, or some of them, free transportation as

aforesaid, the said Erie Railroad Company also contemporaneously carried many other persons over its lines and routes in interstate commerce, from which other persons it exacted and received the full amount of the rates named in its schedule of rates, fares, and charges duly filed with the Interstate Commerce Commission, and then in force, and that thereby the said agents of the said trans-Atlantic steamship lines, or some of them, were given an undue and unreasonable preference and advantage, and the said other persons were subjected to undue and unreasonable prejudice and disadvantage, all of which was in violation of section 3 of the said act to regulate commerce.

Eighth. That all of the foregoing charges have been brought to the attention of the said Erie Railroad Company by officers or agents of the United States, but said Erie Railroad Company claims the right to issue such passes and refuses to withdraw or cancel the same, and your petitioner is informed and believes that the said Erie Railroad Company intends to continue to allow and permit the said agents of the various trans-Atlantic steamship lines to use the said passes and to afford and furnish to the said agents of the various trans-Atlantic steamship lines or some of them interstate transportation at less than the published rates on file as aforesaid, and to discriminate unreasonably against other interstate passengers in violation of the act to regulate commerce as aforesaid, and of the acts amendatory thereof and supplemental thereto, and particularly in violation of sections 1, 2, 3 and 6 of the said act, and of section 3 of the "Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903.

Wherefore, your petitioner prays:

I. That a subpoena or other suitable process may issue according to the course of equity, requiring the said Erie Railroad Company to appear before this honorable court, and then and there to make full, complete, and perfect answer to all the matters and things hereinabove stated and charged, as fully and particularly as if it was specially interrogated in regard thereto, but not under oath, which is hereby waived.

II. That this honorable court will summarily inquire into this petition and on final hearing, upon being satisfied of the truth of the allegations contained herein, will enforce an observance of the published and filed tariffs of the said Erie Railroad Company, and forbid and enjoin the further execution or recognition by the said Erie Railroad Company of the terms of any and all of said passes issued and given as hereinbefore set out, and require a discontinuance of the unlawful practice of issuing free interstate passes to the employees of common carriers which are not subject to the act to regulate commerce, and that the judgment of this honorable court may be carried into effect by such orders, writs, and process as may be proper, and as is provided may be issued under the provisions of section 3 of said "Act to further regulate commerce with foreign nations and among the States," approved February 19, 1903.

III. That this honorable court will grant such other and further relief in the premises as to the court may seem meet and as justice and the equities of the cause may require.

And your petitioner will ever pray, etc.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York, Solicitor for Petitioner.

Office and post-office address, U. S. Court and Post Office Bldg., New York City, N. Y.

(Endorsed) U. S. District Court, S. D. of N. Y. Filed Jan. 23, 1914.

11 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA,
vs.
ERIE RAILROAD COMPANY,
} In Equity, 11-65. No. 1.

The clerk will please enter the appearance of the undersigned as solicitors for Erie Railroad Company, respondent in the above-entitled cause.

GEO. F. BROWNELL,
M. B. PIERCE,
Office and P. O. Address, 50 Church Street, New York City, N. Y.

FEBRUARY 11th, 1914.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 11, 1914.)

12 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER,
vs.
ERIE RAILROAD COMPANY, RESPONDENT.
} In Equity. No. 1.

To the Honorable, the Judges of the United States District Court for the Southern District of New York:

Erie Railroad Company, respondent herein, for its answer to the bill in equity in this proceeding, shows:

First. It admits and alleges that it is a corporation, organized and existing under the laws of the State of New York; and that it is, and during the time stated in the bill was, a common carrier operating lines of railroad extending from, to, and between the places, among others, stated in said bill, and that it is engaged by itself, and also in connection with other common carriers, in the transportation of passengers and property wholly by railroad (and partly by
13 railroad and partly by water where both are used under a common control, management, or arrangement for a continuous

carriage or shipment) from various States of the United States to other States, and from places in the United States to adjacent foreign countries, and from places in the United States through a foreign country to other places in the United States, and also in the transportation in like manner of property shipped from places in the United States to foreign countries and carried from such places to ports of transshipment, and shipped from foreign countries to places in the United States and carried to such places from ports of entry either in the United States or in adjacent foreign countries.

Second. It denies each and every allegation contained in paragraph third of said bill, except that it admits that it has from time to time interchanged with various trans-Atlantic steamship companies and other common carriers by water engaged in the transportation of persons and property in foreign or interstate commerce, passes for certain officers, agents, and employes of such common carriers, who were not at the time such passes were so issued for and to them, and are not now, employees, or members of the family of an employe, or officers, agents, surgeons, physicians, or attorneys at law of this respondent. It admits and alleges that the passes so issued to and for such officers, agents, and employes of said trans-Atlantic steamship companies, common carriers by water as aforesaid, were issued to and for them at the request of said steamship companies, respectively, on account of their employment by said steamship companies and in pursuance of a practice, which has existed ever since many
14 years before the passage of the act to regulate commerce, approved February 4th, 1887, of interchanging passes between said steamship companies, respectively, and this respondent and its predecessors in interest for officers, agents, and employes of such common carriers, respectively. It denies that such officers, agents, and employes of such steamship companies, for and to whom passes have been issued by this respondent as aforesaid, were not at the time of the issuance of such passes within the exceptions and qualifications provided by the act to regulate commerce to the prohibition therein contained against the issuance of free passes except in certain cases or within one of the excepted classes to members of which under the provisions of the act to regulate commerce interstate passes might lawfully be issued by this respondent; and it denies that the issuing by it of such passes for such officers, agents, or employes of said steamship companies was or is in violation of the provisions of section 1 of said act to regulate commerce, either in the respects alleged in said petition or otherwise.

Third. It admits that said trans-Atlantic steamship companies, though common carriers engaged in the transportation of persons and property, are not so engaged with respect to the classes of transportation described in the first section of the act to regulate commerce, and that they are not subject to the provisions of said act; but it denies that they do not receive freight on through bills of lading from American railroads which are subject to the act to regulate

commerce, or that they are not within the terms or meaning of the proviso in the first section of the act to regulate commerce, and it alleges that said trans-Atlantic steamship companies are common carriers within the meaning of that term, as used in said proviso in said section 1 of said act to regulate commerce, which reads: "*Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families."

Fourth. It admits that said officers, agents, and employes, or some of them, of said trans-Atlantic steamship companies have, by means of said passes so interchanged and issued for them, obtained transportation over and upon its interstate lines and routes and been transported by it without its exaction from them of the rates of fare specified in the tariffs filed pursuant to the provisions of the said act to regulate commerce, and in effect at the time; but it denies that said officers, agents, and employes of said steamship companies have at any time obtained free transportation from it, by reason of the matters alleged in paragraph fifth of said bill or of any other matters, in violation of the act to regulate commerce, either in the respects alleged in said paragraph fifth, or in any other respect.

Fifth. It denies that it has violated provisions of the second section of the act to regulate commerce, either in the respect alleged in paragraph sixth of said bill, or in any other respect. It admits that, while furnishing transportation over its interstate lines and routes to said officers, agents, and employes of said trans-Atlantic steamship companies for whom passes had been so interchanged and issued, it contemporaneously transported other persons over its said lines and routes between the same points and exacted and received in money from such other persons for the transportation so furnished to them the full amount of the rates named in its schedules of rates, fares, and charges duly filed with the Interstate Commerce Commission and in effect at such times; but it denies that in such instances the circumstances and conditions pertaining to the transportation furnished and the transportation service performed for said steamship companies' officers, agents, and employes were substantially similar to the circumstances and conditions pertaining to the transportation furnished to and the transportation service performed for such other persons as aforesaid or that said trans-Atlantic steamship companies, or their officers, agents, and employes, were given any undue or unreasonable preference or advantage, or that said other persons were subjected to any undue or unreasonable prejudice or disadvantage in violation of section 3 of said act to regulate commerce, or otherwise.

Sixth. It admits that the charges contained in said bill have been brought to the attention of this respondent, and that it claims the right to continue to interchange passes for its and their officers, agents, and employes with said trans-Atlantic steamship companies, respectively, and by means of such interchange to afford to said officers, agents, and employes of such common carriers interstate

transportation without exacting from them the published rates on file for the transportation of passengers generally, and to secure for its officers, agents, and employes passes or reduced-rate transportation by such steamship companies; and that it intends to so
17 continue unless said interchange of transportation is found to be unlawful; but it denies that such interchange or such transportation constitutes an unreasonable or other discrimination against other interstate passengers in violation of the act to regulate commerce, or of the acts amendatory thereof and supplemental thereto, either in the respects alleged in paragraph eighth of said bill or in any other respect.

Seventh. For further answer to said bill, this respondent alleges:

Said trans-Atlantic steamship companies referred to in this bill were, at the time of the interchange, issuance, and use of said passes for and by their officers, agents, and employes, common carriers under the common law and the laws of the States or countries under which they were incorporated. They operate vessels and transport freight and passengers between ports in Great Britain and Europe and New York and other ports of the United States. A large amount of this passenger and freight traffic is transported by this respondent after its arrival in the United States, or in the United States before its departure on the vessels of said trans-Atlantic steamship companies.

Said trans-Atlantic steamship companies transport a large volume of freight traffic which has been, or is to be, transported over a portion of the route between its point of origin and its point of destination by this respondent and its connecting carriers by railroad. Numerous consignments of freight are carried in continuous transportation without intervention of shipper or consignee from points of shipment in the United States by this respondent and its connecting carriers by rail to the seaboard and thence by such
18 trans-Atlantic steamship companies to Great Britain and European countries and shipments originating in Great Britain and such European countries are handled in the same way in reverse order.

This respondent is interested in securing the transportation of traffic so transported by said trans-Atlantic steamship companies and solicits the routing of the same over its line of railroad to and from its destination in the United States. Through export and import bills of lading are, and have been, for many years and ever since long prior to the passage of said act to regulate commerce, issued by agents of this respondent in connection with other carriers on the route of such traffic, covering the inland or rail transportation of such export or import traffic over the railroads of this respondent and its connecting carriers to or from the port of transshipment or port of entry, and also covering the water carriage by the vessels of said trans-Atlantic steamship companies between such port of trans-shipment or entry and ports or places in Great Britain or Europe. In such bills of lading are set forth severally the terms

and provisions of the contracts relating to the inland transportation by railroad carrier, or carriers, and the ocean carriage by steamship company, respectively, and such bills of lading are signed by the issuing agent on behalf of such railroad companies and of such steamship companies severally and not jointly. The official classification to which this respondent is a party, duly published and filed with the Interstate Commerce Commission, designated as I. C. C.-O. C. No. 41, under which interstate and export and import shipments over the lines of this respondent's railroad are made, contains a copy of the said export bill of lading under which said
19 export shipments are made and carried, and a copy of said export bill of lading is hereto annexed and made a part hereof and marked "Exhibit A."

Agents of said trans-Atlantic steamship companies also issue import bills of lading from European ports covering the ocean carriage to the port of entry in the United States, and also the inland transportation from such port of entry over the railroads of this respondent and its connecting carriers to the place of destination. Agents of such trans-Atlantic steamship companies in Europe, in connection with the sale of tickets for ocean passage, also sell prepaid orders at the lawfully published rate and fares of this respondent and its connecting carriers, which are accepted by it in exchange for tickets covering transportation over its lines to such points of destination.

This respondent maintains offices for the solicitation of traffic in London, and in Liverpool, England, and employs an European traffic manager, who, acting for the ocean carrier and the inland carrier by railroad, severally and not jointly, issues import bills of lading covering shipments exported from Great Britain and Europe to interior points in the United States, which bills of lading contain the several terms and provisions relating to the carriage by such ocean carrier and such carriers by railroad, and which are substantially similar to those contained in the form of export bill of lading above mentioned. Said trans-Atlantic steamship companies are interested in securing for their lines the ocean transportation of such foreign freight and passenger traffic so transported over the railroads of this respondent and other carriers by railroad in the United States.
20 Officers, agents, and employes of said steamship companies travel over the lines of this respondent for the purpose of soliciting this traffic for their lines, and they secure the routing by their ocean lines of passengers and freight transported over the railroad of this respondent via such ocean lines to said ports of Great Britain and Europe. The freight traffic so transported under such export and import bills of lading is carried in continuous transportation without intervention of shipper or consignee from points of shipment in the United States by this respondent and other carriers by railroad to the seaboard and thence by such steamship lines to Great Britain and European countries, and shipments originating in Great Britain

and such European countries are handled in the same way in reverse order.

Respondent further alleges that said passes so interchanged and issued for officers, agents, and employes of said steamship companies were lawfully issued under the proviso of section 1 of the act to regulate commerce permitting the interchange of passes for the officers, agents, and employes of common carriers and their families. Such steamship companies are, and at the time of the issuing of said passes were, common carriers within the meaning of said proviso. Said passes were interchanged with said steamship companies and issued for their said officers, agents, and employes at the request of said steamship companies, and in exchange for passes or reduced-rate transportation given by said steamship companies for officers, agents, and employes of this respondent. For many years prior to, and ever since, the passage of said act to regulate commerce, the railroad carriers in the United States in general, including this respon-
21 dent and its predecessors in interest, have interchanged with other common carriers engaged in the transportation of passengers and property, including trans-Atlantic steamship companies and other common carriers by water, passes and reduced-rate transportation for officers, agents, and employes of their respective companies, subject to and in accordance with the rules and regulations of the respective carriers. Said passes so interchanged and issued by it and such other railroad companies generally have always been on the condition that the persons for whom the same were issued and using the same voluntarily assumed all risk of accidents and agreed that the railroad company should not be liable under any circumstances, whether of negligence of such company or its agents or otherwise, for any injury to the person or property of such users; and the rights and privileges of the persons for whom such passes have been issued, with respect to the transportation afforded them thereunder have been and are limited in other material respects as compared with the rights and privileges of passengers for hire transported by this respondent and other railroad companies generally for the regular tariff rates of fare. No distinction has been made or recognized with respect to the right to so interchange and issue passes for officers, agents, and employes of such carriers engaged in the transportation of persons and property based upon the fact that certain of such common carriers are common carriers by water, or the fact that certain of such common carriers by water or by railroad, including said trans-Atlantic steamship companies, have no situs in the United States, and are engaged in the transportation of persons and property only to and from but not within the United States;
22 although the number and amount of passes and reduced-rate transportation so interchanged and issued by this respondent and other railroad companies for officers, agents, and employes of such trans-Atlantic steamship companies or issued in such interchange by said trans-Atlantic steamship companies for officers, agents, and em-

ployes of this respondent or other railroad companies has been, and naturally is, very limited as compared with the number and amount thereof interchanged between and issued by this respondent and other railroad companies in the United States for officers, agents, and employes of other railroad companies in the United States.

Since the passage of the act to regulate commerce no distinction has ever been recognized or made with respect to the right to so interchange and issue passes between railroad companies and other common carriers by railroad or by water, including said trans-Atlantic steamship companies, on the basis of the fact that such trans-Atlantic steamship companies or other common carriers are not subject to the act to regulate commerce or have not united with a carrier subject to the act for the interstate transportation of passengers or property by concurrence in one or more tariffs published and filed with the Interstate Commerce Commission.

Said custom and practice of this respondent and railroad companies generally of interchanging with such trans-Atlantic steamship companies passes and reduced-rate transportation for officers, agents, and employes of such steamship companies and railroad companies, respectively, to the limited extent above stated is one which as a matter of common knowledge has existed and been openly followed by this respondent and other carriers gen-
23 erally for many years. Its existence was well and commonly known long before the passage of the interstate commerce act, by the terms of which its continuance was permitted. It rests upon the same consideration, including considerations of business policy, which have always been recognized as justifying the interchange and issuance by and between railroad companies of passes and reduced-rate transportation for officers, agents, and employes of other railroad companies, and Congress by the above-mentioned proviso contained in section 1 of the act to regulate commerce as amended by the act approved June 29, 1906, recognized and permitted the continuance of the custom and practice.

Wherefore, this respondent prays that the bill herein be dismissed at the petitioner's cost and for such other action as may be appropriate.

ERIE RAILROAD COMPANY,
By GEO. F. BROWNELL,
M. B. PIERCE,
Its Solicitors.

(Office and post-office address, 50 Church St., New York City, N. Y.)

FEBRUARY 5th, 1914.

24 Exhibit "A."

(Endorsed:) Due service of a copy of the within is hereby admitted. New York, N. Y., February 11, 1914.

H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York,
Solicitor for Petitioner.

U. S. District Court, S. D. of N. Y., filed Feb. 11, 1914.

25 United States District Court for the Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER,
vs.
ERIE RAILROAD COMPANY, RESPONDENT.
} Action No. 1. E–11–65.

SIRS: Please take notice that upon March 20, 1914, at 10.30 o'clock a. m., or as soon thereafter as counsel may be heard, a motion will be made by the solicitor for the petitioner herein before one of the judges of the United States District Court for the Southern District of New York at a session of said district court to be held in the United States court and post-office building, in the borough of Manhattan, city of New York, for judgment upon the bill and answer herein and for the relief prayed for in the petitioner's bill.

MARCH 14, 1914.

Yours, &c.,
H. SNOWDEN MARSHALL,
United States Attorney for the Southern District of New York.

(Office and post-office address: U. S. court and post-office building, borough of Manhattan, city of New York.)

To GEORGE F. BROWNELL, Esq., and M. B. PIERCE, Esq., solicitors for the respondent, 50 Church Street, New York, N. Y.

26 (Endorsed:) Due service of a copy of the within is hereby admitted. New York, Mch. 14, 1914. Geo. F. Brownell, M. B. Pierce, attorneys for Erie R. R. Co.—U. S. District Court, S. D. of N. Y., filed Apr. 7, 1914.

27 MARCH 20, 1914.

The court is opened by proclamation.
Present: Hon. Charles M. Hough, D. J.

UNITED STATES,
vs.
ERIE RAILROAD COMPANY.
} Actions No. 1 and No. 2.

Causes coming on for hearing on motions for judgment on the pleadings.

Assistant U. S. Attorney Knox, for the motion.
Messrs. Geo. F. Brownell and M. B. Pierce, opposed.

These cases, by consent of both parties, were brought on for hearing before Hon. Charles M. Hough, U. S. District Judge, and the following stipulation was made:

"It is stipulated and agreed between counsel in the above-entitled causes, that for the determination of the issues in this proceeding the facts shall be those facts alleged in the bill, not denied or qualified in the answer, and those facts alleged and set out in the answer, that all of such facts are for the purposes of this proceeding only admitted to be true and correct."

28 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, *vs.* ERIE RAILROAD COMPANY.	Action No. 1: Issuing passes to agents of trans-Atlantic steamship lines. Action No. 2: Issuing pass to agent Great Eastern Railway of England.

Final hearings in equity; actions to restrain the continuance of the transportation privileges represented by the passes above referred to.

Mr. John C. Knox, Assistant U. S. Attorney, for complainant; Mr. George F. Brownell, for defendant.

HOUGH, D. J.: From a date prior to 1887, and continuously since that time, the Erie Railroad has been in the habit of issuing passes to certain agents or officials of the trans-Atlantic steamship lines using the port of New York. Between the railroad and steamship companies there has been an interchange of passes for the purpose of maintaining relations from which profit was desired. The steamship companies control much through freight; so does the Erie Railroad; and each hoped to get more freight through the influence of those gratified by said interchange of passes.

The Erie Railroad also maintains an agent in England, whose business it is to solicit through freight. He receives passes over the lines of the Great Eastern Railway of England, in return for which the defendant issues a pass over its lines to the American agent of the English railway. This arrangement likewise has con-

29 tinued for many years and antedates 1887.

It is admitted that the defendant is a corporation engaged in interstate traffic and is subject to the provisions of what is commonly known as the interstate commerce law; and it is also admitted that neither the ocean carriers nor the Great Eastern Railway of England is subject to said act, although all are common carriers within the ordinary meaning of those words.

Section 22 of the interstate commerce law has from the passage of the first statute in 1887 contained these words:

"Nothing in this act shall be construed * * * to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

Since the Hepburn act of 1906 the first section of the interstate commerce law has contained these words:

"No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly issue or give any interstate free ticket, free pass, or free transportation for passengers, * * * provided that this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families, nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation."

The amendment of 1910 inserted the following words (next after those above quoted):

"And provided further that this provision shall not be construed to prohibit the privilege of passes or franks or the exchange
30 thereof with each other for the officers, agents, employees, and their families of such telegraph, telephone, and cable lines and the officers, agents, employees, and their families of other common carriers subject to the provisions of this act."

The proviso of 1910 is evidently intended to cover the case of employees of cable, telegraph, and telephone lines, which were in that year brought within the purview of the interstate commerce law; but I am quite unable to see any reason for the rest of said proviso.

The object of these actions is to enjoin the defendant from continuing the long-standing practice above outlined, because the common carriers or railroads referred to in the quoted sections of the law must be held to mean, not common carriers and railroads generally, but "common carriers subject to the provisions of this act."

These suits were laid before the Commerce Court, and were dismissed without prejudice because the court was divided in opinion.

Shortly after the passage of the Hepburn act this question came before the Interstate Commerce Commission (12 I. C. C. Rep., 39), and it was there plainly held that no interchange of passes would be permitted between ordinary common carriers or common carriers at common law and "common carriers subject to the provisions of this act."

The position of the commission is, in substance, that the general prohibition of the Hepburn act is only modified by the proviso to the extent of "making a special exception of the giving of passes by way of interchange to the employees of any other common carrier subject to the act."

31 This seems to me assertion rather than reasoning, but there is really very little more to say about it. To decide this matter as one of law is making bricks without straw, for everyone admits that the object of the court must be to carry out the intent of the Legislature; yet if by "intent" is meant conscious purpose, it is, I

think, a safe presumption that Congress never considered the point here involved.

In the absence of any real intent it is the habit of courts to endeavor to ascertain whether from the language used an imputed intent can be spelled out.

Applying this method it is a fair query to ask whether the context indicates throughout the act that "common carriers" is to be synonymous with "common carriers subject to the provisions of this act."

As amended to date I find the following instances of the use of the phrase "common carriers" in illustrative positions:

In section 1 there is a proviso:

"That nothing in this act shall be construed to prevent telephone, telegraph, and cable companies from entering into contracts with common carriers for the exchange of services."

Here "common carriers" must refer to common carriers generally, for otherwise telegraph and telephone companies might find themselves hampered in extending their business with concerns entirely unconnected with interstate commerce.

The penal provision, which is a part of the antipass legislation, begins with the expression:

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor," etc.

Here the phrase evidently refers only to carriers subject "to the provisions of this act."

32 The provisions of section 1 relating to private sidings and lateral branch lines declare that "if any common carrier shall fail to install and operate any such switch," the commission shall investigate the matter and make an order "directing the common carrier to comply with the provisions of this section."

Here evidently the phrase can refer only to carriers "subject to the provisions of this act."

Section 3, relating to interchange of traffic, does not consistently use the phrase "carrier subject to the provisions of this act," yet I think it plain that in every instance where the phrase "carrier" is used it means "carrier subject to the provisions of this act."

Section 5 (the antipooling provision) prohibits combinations "with any other common carrier or carriers," which phrase, I think, is plainly intended to cover any and all carriers whether the same be subject to the provisions of the interstate commerce law or not.

Section 6 (relating to published tariffs) does not always use the phrase "common carrier subject to the provisions of this act," but, in my judgment, it can only mean such carrier, as may be seen from the context.

This is especially noticeable in the subsection relating to the expedition of military traffic in time of war, which declares that "carriers shall adopt every means within their control to facilitate and expedite the military traffic."

This can only refer to "carriers subject to the provisions of this act."

Section 13, which gives to "any common carrier" the right to complain of the acts or omissions of "any common carrier subject
33 to the provisions of this act" specifically puts the two classes of carriers in contradistinction.

In section 15 it is provided as proper for a common carrier to give information "to another carrier or its duly authorized agent for the purpose of adjusting mutual traffic accounts in the ordinary course of business of such carriers."

The phrase "another carrier" must mean, in many instances, a carrier not subject to the provisions of this act.

The reparation section (No. 16) provides that the commission may make an order "directing the carrier to pay to the complainant the sum to which he is entitled."

This, of course, can only refer to a "carrier subject to the provisions of this act," and the same may be said of the subsequent portions of the same section relating to the duty of carriers to comply with the commission's order; the penalty upon a carrier for neglecting to obey an order; and the right of the commission to apply for a court decree enforcing an order.

The so-called Carmack amendment to section 20 nowhere employs the phrase "carrier subject to the provisions of this act," yet every carrier affected is in a certain sense within the provisions of the act. The language of this amendment, however, does not seem to me enlightening, because it is really new and different legislation not germane to the general purposes of the statute.

The foregoing examination of the act satisfies me that no attempt has been made to give to the phrases "common carrier" and "common carrier subject to the provisions of this act" an identical
34 meaning; and all arguments based on such identity fail.

It is another admitted canon of interpretation that the statute is to be construed with reference to the object intended to be accomplished. The interstate commerce law is clearly a remedial act, and is to be benevolently interpreted; but it can hardly be said that it has been the intention of even its most affectionate supporters to bring all the business or all the operations of the "carriers subject to the provisions of this act" within the compulsion of the statute. So far as many heads of legislation are concerned, it is historically known that only a small proportion of our legislators have been willing to extend the power of Congress over interstate commerce to its limit. It has hitherto been deemed sufficient to legislate over a limited field only; and I find it impossible to perceive, either in the language of the act, the history of its preparation, or the literature which has grown up around it, any clear intent to upset the settled habit, not only of this defendant, but all American carriers, of seeking or encouraging business in foreign fields or fields not within the power of Congress by methods which are still permissible within

the congressional field of regulation. Admittedly the Erie Railroad can exchange passes with the New York Central, and why it is obnoxious to the object of the interstate commerce law for the Erie to do the same thing with foreign carriers who are in business relations with it, is more than I can see.

Indeed, the "object" of a statute rarely means more than a supposed governmental policy, and it has been said that such policy is too unstable a ground upon which to rest the judgment of the court in the interpretation of statutes (Hadden vs. Collector, 5 Wall., 107).

35 The argument of inconvenience is easy to advance, but very misleading. In doubtful cases it is true that a statutory construction occasioning great inconvenience or productive of inequality and injustice is not to be preferred if another and more reasonable construction can be found. Knowlton vs. Moore, 178 U. S., 41. It is vigorously urged here as matter of notoriety that there are already municipalities in this country which are in a sense common carriers, in that (in New York and Boston) they maintain ferries for hire, and also that the United States itself is reputed to own a railway common carrier in the Canal Zone, and is about to construct and operate a similar common carrier in Alaska. On these facts the argument is based that every official of the United States from the highest to the lowest, and all the officers or employees of New York and Boston may be favored with passes, to the great detriment of the public. The jumping of such intellectual fences as these may be left until we come to them. To my mind the argument only shows how fallacious is reasoning ab inconvenienti.

To sum this matter up, it is plain that the contention of the Government is not to be found in the letter of the statute; nor is it discoverable in the spirit thereof, because there is no evidence of actual intent on the part of the legislature, because viewing the whole act the phrase "common carrier" is not and was not intended to be synonymous with the phrase "common carrier subject to the provisions of this act," and because there is no reason shown why Congress should be thought to have given the privilege of exchanging passes with one kind of common carrier and not with another, when such exchanges are made and always have been made with all

36 common carriers for the same reasons, viz, a desire to curry favor with persons having business to place.

If these well-known reasons no longer meet approval, if mutual back scratching has become sinful, the remedy is another statute, not stretching the present one.

Bills dismissed.

April 3, 1914.

C. M. Hough, D. J.

(Endorsed:) U. S. District Court, S. D. of N. Y.
Filed Apr. 3, 1914.

37 At a stated term of the United States District Court, held in and for the Southern District of New York, at the court rooms of said court in the Post-Office Building, city of New York, on the 21st day of April, 1914.

Present: Hon. Charles M. Hough, District Judge.

UNITED STATES OF AMERICA, *versus* ERIE RAILROAD COMPANY.	In Equity. Actions Nos. 1 and 2. E. 11–65 and E. 11–66.

These causes came on to be heard together at the March term, and were argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged, and decreed that the bills be, and the same hereby are, dismissed.

C. M. HOUGH,
United States District Judge.

Dated New York, April 21, 1914.
Objections as to notice waived.
Approved as to form.

H. SNOWDEN MARSHALL,
United States Attorney,
Solicitor for Petitioner.

(Endorsed:) U. S. District Court, S. D. of N. Y., filed Apr. 22, 1914.

38 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, petitioner, *against* ERIE RAILROAD COMPANY, respondent.	In Equity. Action No. 1. E. 11–65. Petition for Appeal.

To the Honorable Judges of the United States District Court for the Southern District of New York.

Comes now the United States of America, by H. Snowden Marshall, United States Attorney for the Southern District of New York, its solicitor of record, and the United States of America, conceiving itself to be aggrieved by the order and decree made and entered by the above named court in the above entitled cause, under date of April twenty-second, nineteen hundred and fourteen, in the manner and instances set forth in the assignment of errors filed in said cause, does hereby appeal to the present term of the Supreme Court of the United States from said order and decree, and each and every part thereof; and that the United States of America prays that this, its petition for its said appeal, may be allowed; that a transcript

of so much of the record on which said order and decree so appealed from was made, and the subsequent proceedings and papers
39 in this suit as may be deemed sufficient by this court, duly authenticated, may be sent to the Supreme Court of the United States, and that said order and decree, and each and every part thereof so appealed from, may be reversed.

New York, April 29, 1914.

H. SNOWDEN MARSHALL,
United States Attorney, Solicitor for United States of America.

(Office and post-office address: Room 50, United States court and post office building, Borough of Manhattan, City of New York.)

The foregoing appeal is hereby allowed.

C. M. HOUGH,
U. S. District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y., filed Apr. 29, 1914.

40 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, petitioner, *vs.* ERIE RAILROAD COMPANY, respondent.	In Equity. Action No. 1. E. 11-65. Assignment of Errors.

Now comes the petitioner, by H. Snowden Marshall, United States Attorney for the Southern District of New York, its solicitor, and makes and files the following assignment of errors which it alleges occurred on the trial of this action and upon which it will rely on the prosecution of its appeal.

First. The court erred in holding and deciding that the various trans-Atlantic steamship lines mentioned in the petitioner's bill were common carriers within the terms and meaning of the words "common carriers," as the same are used in the first proviso of section 1 of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, as amended.

Second. The court erred in holding and deciding that the Erie Railroad Company lawfully issued and gave free interstate passes to agents of said various trans-Atlantic steamship lines for the free transportation of said agents over and upon the interstate lines and routes of transportation of said Erie Railroad Company under the provisions of section 1 of said act to regulate commerce as amended.

Third. The court erred in holding and deciding that Erie
41 Railroad Company and said various trans-Atlantic steamship lines might lawfully interchange passes for their respective officers, agents, and employees under the provisions of the first proviso of section 1 of said act to regulate commerce, as amended.

Fourth. The court erred in failing to hold and decide that Erie Railroad Company violated section 2 of said act to regulate com-

merce, as amended, by having furnished free interstate transportation to said agents of said various trans-Atlantic steamship lines, or some of them, and contemporaneously, with the said free interstate transportation of said agents, or some of them, having furnished interstate transportation to other persons between the same points, from and to which said agents, or some of them, were transported, from which other persons said Erie Railroad Company exacted and received in money the full amount of the rates named in the schedule of rates, fares, and charges duly filed by said Erie Railroad Company with the Interstate Commerce Commission, and in force and effect at the time such transportation was furnished as aforesaid.

Fifth. The court erred in failing to hold and decide that Erie Railroad Company violated section 3 of said act to regulate commerce, as amended, by having furnished free interstate transportation to said agents, or some of them, as aforesaid, and contemporaneously therewith, having furnished other persons transportation over and upon its interstate lines and routes under the conditions hereinbefore set out.

Sixth. The court erred in failing to hold and decide that Erie Railroad Company violated section 6 of said act to regulate
42 commerce, as amended, in having furnished free transportation over and upon its interstate lines and routes to said agents of said various trans-Atlantic steamship lines, or some of them, upon and by reason of passes issued and given to said agents, so furnished transportation as aforesaid, by said Erie Railroad Company.

Seventh. The court erred in failing to hold and decide that the refusal of said Erie Railroad Company to withdraw and cancel the free interstate passes issued to said agents of the various trans-Atlantic steamship lines, and that the expressed intention of said Erie Railroad Company to continue to allow and permit the said agents to use the said passes issued to them as aforesaid, and to furnish said agents, or some of them, free transportation over and upon its interstate lines and routes, on account of and by reason of the passes so issued to them, entitled the petitioner herein to equitable relief.

Eighth. The court erred in failing to direct and enforce an observance by the Erie Railroad Company of its filed and published tariffs.

Ninth. The court erred in failing to forbid and enjoin the further execution or recognition by said Erie Railroad Company of the passes issued to said agents of said various trans-Atlantic steamship lines as aforesaid.

Tenth. The court erred in failing to require and direct the discontinuance by said Erie Railroad Company of its practice of issuing free interstate passes to the employes of common carriers that are not subject to the provisions of the said act to regulate commerce, as amended.

43 Eleventh. The court erred in directing and entering a decree in this action dismissing the petitioner's bill.

And the petitioner prays that the decree aforesaid, for the errors aforesaid, and for the other errors in the record and proceedings herein may be reversed and for naught held and esteemed, and that it may be restored to all things that it hath lost by reason of said decree.

Dated April 29, 1914.

H. SNOWDEN MARSHALL,
United States Attorney, for Southern District of New York.

(U. S. Court House and Post Office Building, Borough of Manhattan, New York, N. Y.)

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Apr. 29, 1914.

44 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA, PETITIONER, *vs.* ERIE RAILROAD COMPANY, RESPONDENT.	In Equity. Action No. 1. E 11–65.

Citation.

By the Honorable Charles M. Hough, one of the justices of the District Court of the United States for the Southern District of New York, in the Second Circuit, to the Erie Railroad Company, and George F. Brownell and M. B. Pierce, Solicitors, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be holden at the city of Washington, in the District of Columbia, on the 28th day of May, 1914, pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Southern District of New York, from a judgment and decree made on or about April 22, 1914,
45 in a certain proceeding wherein the United States of America is the petitioner and the Erie Railroad Company is respondent, and wherein the United States of America is the appellant and you are the respondent, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the city of New York, in the district and circuit above named, this 29th day of April, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-eighth.

C. M. HOUGH,
Judge of the District Court of the United States, for the Southern District of New York, in the Second Circuit.

(Indorsed:) Original. U. S. District Court, Southern District of New York. United States of America, petitioner, *versus* Erie Railroad Company, respondent. Citation. In equity action No. 1. E

11–65. H. Snowden Marshall, United States Attorney, Attorney for U. S. Due service of a copy of the within is hereby admitted. New York, Apr. 29, 1914. Geo. F. Brownell, M. B. Pierce, Solr. Resp.

U. S. District Court, S. D. of N. Y. Filed May 1, 1914.)

47 UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA, PETITIONER,
vs.
ERIE RAILROAD COMPANY, RESPONDENT. } Action No. 1.

I, Alexander Gilchrist, jr., clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 19th day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the said United States the one hundred and thirty-eighth.

[SEAL.] ALEX. GILCHRIST, Jr., *Clerk*.

(Indorsement on cover:) File No. 24231. S. New York, D. C. U. S. Term No. 493. The United States, appellant, *vs.* Erie Railroad Company. Filed May 22d, 1914. File No. 24231.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1914

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